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ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NEW YORK STATE BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the New York State Bar Association ("NYSBA") is the largest voluntary state bar association in the United States with approximately 74,000 members.[1] Among its functions, the NYSBA develops forward-looking policies relevant to the profession and takes positions in litigation (either as party or *amicus*) concerning matters of interest to its members and the legal profession as a whole. The NYSBA previously has submitted *amicus* briefs in the Supreme Court of the United States, including in *Fisher I* (*Fisher v. Univ. of Texas*, 133 S. Ct. 2411 (2013). Like its earlier *amicus* submission in this matter, this brief is limited to highlighting the importance of racial and ethnic diversity within the legal profession and the concomitant need to maintain an adequate flow of diverse students in the undergraduate "pipeline" to fill seats in law schools and ultimately enter the profession. The NYSBA is actively committed to increasing diversity in the legal profession including developing and running undergraduate and high school "pipeline" programs (*see*, *infra*, at 20-27).[2] The American Bar Association ("ABA")

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1. This brief is submitted pursuant to the blanket consent letters from all parties on file with the Court. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution.

2. Counsel for *amicus* are actively involved in the NYSBA and its diversity programming. David P. Miranda is the current President of the NYSBA. David H. Tennant is a former chair of the NYSBA's Commercial and Federal Litigation Section, which is a leader in diversity programming for the Association (described herein).

has bestowed its Partnership Award on the NYSBA in recognition of its continuing diversity initiatives. *See, infra*, at 22.

In advocating for the compelling government interest in promoting diversity in the legal profession, the NYSBA takes no position on whether the specific steps taken by the University of Texas fall within the educational interests in student body diversity endorsed in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

SUMMARY OF ARGUMENT

The government has a compelling interest in promoting diversity in the legal profession because of the central role that lawyers, judges and legal institutions play in resolving civil and criminal matters and maintaining social order. The Framers of the Constitution understood the essential role that lawyers and judges would play in carrying out the founders' stated mission to "establish justice, insure domestic tranquility . . . and secure the blessings of liberty to ourselves and our posterity." U.S. Const. (Preamble). A true commitment to diversity in the legal profession must recognize the undeniable fact that the demographics of the United States' population are changing—becoming more diverse racially and ethnically—and that institutions in the United States will lose credibility and effectiveness if they fail to adapt to these changes. For the legal profession, the consequences of failing to become more diverse in a "majority-minority" America are profound. The legitimacy and effectiveness of our civil and criminal justice systems will be undermined if the profession does not reflect the changing demographics. The lack of diversity among lawyers and judges today fuels distrust of

the legal system in many minority communities. Allowing such underrepresentation to persist, while the society at large becomes increasingly diverse, is untenable. It will lead to a stark racial divide that will only exacerbate the distrust and disaffection among people of color and will, ultimately, leave the majority of Americans to view the legal profession as an out-of-touch holdover from a bygone era. For the legal profession to continue serving its vital mission in a "majority-minority" America, colleges must graduate in substantial numbers qualified and talented diverse candidates who are prepared to enter the nation's law schools. That is the only way the legal profession can become meaningfully diverse and earn the confidence of an increasingly diverse nation.

ARGUMENT

THE GOVERNMENT HAS A COMPELLING INTEREST IN PROMOTING DIVERSITY IN THE LEGAL PROFESSION.[3]

1. To Remain Effective, The Legal Profession Must Reflect The Changing Demographics Of The United States' Population.

The legal profession remains overwhelmingly white in a country that is increasingly diverse. As of the 2010 Census, 88% of attorneys in the United States were white

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3. The Court has already affirmed the fact that diversity in our educational institutions is a compelling state interest (*see Grutter v. Bollinger*, 539 U.S. 306, 325 (2003)) so we are compelled to address this issue here only because Petitioner continues to challenge that concept.

(not Hispanic). *See* ABA Lawyer Demographics Table (2015) ("ABA 2015 Table"), at http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf (last visited Oct. 22, 2015).[4] Minority attorneys made up less than 12 percent of the profession. *Id.* This underrepresentation of minority attorneys nationally is reflected in New York State. Even though New York has a more diverse population than most states,[5] and the NYSBA has taken aggressive steps to increase diversity in the profession (*infra*, at 20-27), the bar in New York mirrored the national percentage of 88% white attorneys as recently as 2013. *See* NYSBA Diversity Report Card (5th Ed., 2013) ("NYSBA Report Card") at 16, at http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=48879[6] (last visited Oct. 22, 2015).

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4. This brief relies on the ABA 2015 Table and other recent bar studies of diversity within the legal profession, as well as the national population survey, as the best measure of the limited inroads into the profession made by minorities, with the reports culling data from the 2010 Census and qualitative surveys. As documented outside the Census process, minority entry into the profession over the past decade has been very limited and not at par with other professions. *See*, *infra*, at 7.

5. New York State ranks fourth of fifty-one states in diversity. *See* NYSBA Report, Judicial Diversity: A Work in Progress (September 2014) ("NYSBA Judicial Report") at 3, n. 5, at https://www.nysba.org/DownloadAsset.aspx?id=52022 (last visited Oct. 22, 2015).

6. In 2013, the 12 percent of attorneys "of color" in New York broke down as follows: 3.1 percent African American, 2.3 percent Hispanic, 4.8 percent Asian American, 0.3 percent Native American, and 0.3 multiple race. NYSBA Report Card, at 16.

The lack of diversity in the legal profession nationally and in New York stands in sharp contrast to "the browning" of the general population of the United States from 1970 to 2009.[7]

	1970	1980	2000	2009
Whites	87.4	83.2	70	66.1
Afr. Am	11.1	11.7	12.3	12.8
Am. Ind	.4	.6	1.5	1
Asian Am.	.8	1.5	4.3	4.4
Hisp.	4.5	6.5	12.5	15.1
Other	.3	3		1.6

[Table Reproduced from ABA Report and Recommendations, *The Next Steps, Diversity in the Legal Profession* (April 2010) ("ABA 2010 Report"), at http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf. at 10 (last visited Oct. 22, 2015).]

7. The phrase "browning of America" (often attributed incorrectly to author Richard Rodriguez) "has been used regularly to describe an increase in the mixing of cultural, racial, and ethnic identities in the United States in the past century. . . .The phrase is commonly applied to the current demographic shift towards a higher proportion of minorities in the total population in the United States. It can be used neutrally as a name for the current demographic shift in the United States . . . ." http://en.wikipedia.org/wiki/Richard_Rodriguez (last visited Oct. 22, 2015). *See, e.g.*, The Washington Post, *The Browning of America*, May 18, 2012; William A. Henry III, *Beyond the Melting Pot*, 135(15), Time Magazine, Apr. 9, 1990 ("In the 21st century—and that's not far off— racial and ethnic groups in the U.S. will outnumber whites for the first time. The "browning of America" will alter everything in society. . . .").

Given these population trends, the United States is projected to be less than 50% non-Hispanic white within 30 years.[8] *See* http://inamerica.blogs.cnn.com/2012/05/17/census-2011-data-confirm-trend-of-population-diversity (last visited Oct. 22, 2015) ("If the trend continues, . . . several decades from now, possibly in the late 2030s or early 2040s, the U.S. population will become less than 50% non-Hispanic white"); *see also*, U.S. Census Bureau, Population Division, Table 11, *Percent of the Projected Population by Hispanic Origin and Race for the United States: 2015 to 2060* (NP2014-T11) (December 2014) ("2014 U.S. Census Population Projection"). By 2050, the United States' population is projected to be 47 percent non-Hispanic white; 27 percent Hispanic; 13 percent African American; 8 percent Asian American and 1 percent Native American. *See* 2014 U.S. Census Population Projection; *see also*, Jeffrey S. Passel & D'Vera Cohn, U.S. Population Projections: 2005-2050, Pew Hispanic Center (Feb. 11, 2008), at http://www.pewhispanic.org/files/reports/85.pdf (last visited Oct. 22, 2015) at 9-10; *accord*, Sandra L. Colby & Jennifer M. Ortman, Projections of the Size and Composition of the U.S. Population: 2014 to 2060, United States Census Bureau, at 9 (March 2015) ("2015 Census Projections") (projecting national population to 2060).[9]

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8. According to at least one demographer, in 2015 there exists a "no majority" America within this country's population of children under the age of five, as well as within the public school population. William H. Frey, *In the U.S., diversity is the new majority*, Los Angeles Times, Op-Ed, March 6, 2015, at http://www.latimes.com/opinion/op-ed/la-oe-0310-frey-no-racial-majority-america-20150310-story.html (last visited Oct. 22, 2015).

9. The demographic changes are dramatic. The population of the United States is projected to increase from 319 million in 2014 to 417 million in 2060, an increase of 31 percent. *See* 2015

Racial and ethnic minorities remain seriously underrepresented in the legal profession relative not only to their numbers in the general population but also to their participation rates in other professions. While minorities comprised 16 percent of all lawyers in the United States in 2014, minorities represented 27 percent of accountants and auditors, 25 percent of management professionals, and 33 percent of physicians. *See* United States Department of Labor, Labor Force Statistics from the Current Population Survey, Table 11 (Employed persons by detailed occupation, sex, race and Hispanic or Latino ethnicity), at http://www.bls.gov/cps/cpsaat11.htm (last visited Oct. 22, 2015); *see also*, Deborah L. Rhode, *Law is the least diverse profession in the nation. And lawyers aren't doing enough to change that.*, The Washington Post, PostEverything (May 27, 2015), at https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/ (last visited Oct. 22, 2015); Elizabeth Chambliss, *Miles to Go 2000: Progress of Minorities in the Legal Profession*, ABA Commission on Racial and Ethnic Diversity in the Profession (2000) (ABA study confirms that "minority representation in the legal profession is significantly lower than in most other professions, with only dentistry and natural science demonstrating worse records.").

Census Projections at 9. During that same period, it is estimated that the Hispanic population will more than double in size from 55 to 119 million; the Asian American population will nearly triple in size from 14 to 39 million; the African American population will increase by 42 percent, from 42 to 60 million; and the white (not Hispanic) population will decrease by 8 percent, from 198 to 182 million. *See id.*

The very slow rate of entry into the legal profession by traditionally underrepresented minority populations, coupled with rapid increases in racial and ethnic diversity in the general population, will lead to a serious demographic disjuncture with serious consequences for the administration of justice. Former ABA President (and former Mayor of Detroit and Michigan Supreme Court Justice) Dennis Archer observed:

> Too often, where white people see justice in our legal system, people of color see justice short-changed. When you recognize that in the United States, it is the ability to petition our courts for fairness that keeps people from seeking justice in the streets, then you understand that diversity in the legal profession is critical for democracy to survive.

ABA Presidential Advisory Council on Diversity in the Profession, *The Critical Need to Further Diversify the Legal Academy & the Legal Profession* (October 2005), at http://apps.americanbar.org/op/pipelineconf/acdreport.pdf (last visited Oct. 22, 2015).[10]

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10. Dennis Archer was the first lawyer of color to lead the American Bar Association in its 125-year history and remains an outspoken advocate of diversity in the legal profession. *See* Dennis W. Archer, *The Value of Diversity: What the Legal Profession Must Do to Stay Ahead of the Curve*, 12 Wash. U.J.L. & Pol'y 25 (2003); *id.* at 27 ("What we need are more lawyers of color. We need them as judges in all jurisdictions. We need them as law clerks, law professors, general counsel, and partners in large law firms."); ABA President Carolyn B. Lamm (ABA 2010 Report at 3): "[w]e are committed to see a bench that reflects our population." Increasing racial and ethnic diversity among lawyers and judges will help to address differing perceptions of justice in minority

The widespread distrust of law enforcement in many minority communities has taken on new meaning following a series of highly publicized and controversial police killings of unarmed African American men, precipitating the new social movement, "Black Lives Matter." The U.S. Department of Justice's investigation of the policing and prosecution practices in Ferguson, Missouri was nothing short of damning. The DOJ found institutionalized racism on the part of the predominately white police force and court system in what is a largely African-American community. *See* Wesley Lowery, Carol D. Leonning & Mark Berman, *Even Before Michael Brown's slaying in Ferguson, racial questions hung over police*, The Washington Post (August 13, 2014), at https://www.washingtonpost.com/politics/even-before-teen-michael-browns-slaying-in-mo-racial-questions-have-hung-over-police/2014/08/13/78b3c5c6-2307-11e4-86ca-6f03cbd15c1a_story.html (last visited Oct. 22, 2015); *see also*, Amanda Sakuma, *Holder outlines damning report of racial bias by Ferguson police*, MSNBC (March 4, 2015), at http://www.msnbc.com/msnbc/eric-holder-racial-bias-

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communities. ABA *Perceptions of Justice Project, A Dialogue on Race, Ethnicity and the Courts*, at http://www.americanbar.org/content/dam/aba/administrative/lawyers_conference/2011_poj_writtenreport.authcheckdam.pdf (last visited Oct. 22, 2015). The ABA convened a series of town hall meetings between 2009 and 2011 to identify and document the perceptions of justice across racial and ethnic groups. At the April 7, 2009 symposium, held at SMU Dedman School of Law, speakers "shared statistics demonstrating that people of color have a disturbingly low level of confidence in our justice system and are convinced that color-blind and fair justice does not exist." *Id.* at 3. The ABA is now developing strategies to address the identified concerns. *Id.* at 1. Increasing the number of persons of color working in the justice system is widely viewed as an essential step. *Id.* at 5, 7, 9.

ferguson-policing (last visited Oct. 22, 2015). Such racial divides arise when a community is being policed by officers who not only look different from the community at large, but whose life experiences and views on racial matters are markedly different. *See, e.g.*, Bruce Drake, *Ferguson highlights deep divisions between blacks and whites in America*, Pew Research Center (November 26, 2014), at http://www.pewresearch.org/fact-tank/2014/11/26/ferguson-highlights-deep-divisions-between-blacks-and-whites-in-america/ (last visited Oct. 22, 2015). A critical step in bridging gaps in experience, and closing racial divisions, is to increase minority participation in police forces, prosecutor offices, and the court system, including as judges and juries.

A 2014 study revealed a distressing lack of diversity among our Nation's elected prosecutors. Sixty-six percent of the states that elect prosecutors have not a single black prosecutor in that office. Faced with this reality, Brenda Choresi Carter, a member of the Women Donors Network, the group who led the study, concluded: "[w]hat this shows us is that, in the context of a growing crisis that we all recognize in criminal justice in this country, we have a system where incredible power and discretion is concentrated in the hands of one demographic group." Nicholas Fandos, *A Study Documents the Paucity of Black Elected Prosecutors: Zero in Most States*, The New York Times (July 7, 2015), at http://www.nytimes.com/2015/07/07/us/a-study-documents-the-paucity-of-black-elected-prosecutors-zero-in-most-states.html?_r=4. *See also,* Katherine J. Bies *et al., Stuck in the '70s: The Demographics of California Prosecutors*, Stanford Criminal Justice Center (July 2015) at 10 (noting "[m]inorities are heavily underrepresented among

California prosecutors"); *id.* at 15 (explaining why diversity among prosecutors matters, citing research showing disparate treatment of minorities in charging decisions, documented implicit bias against racial minorities, and observing that "[t]he presence of minority attorneys in a prosecutor's office may also make the office more likely to adopt policies and champion initiatives that are responsive to the concerns of minority residents."); *id.* at 16 ("Research suggests that minorities have less trust and confidence in the police, the courts, and the legal system.").

It is critical to the legal profession–and to society–to attract more minorities to law school, to "feed the pipeline." This is not a cosmetic concern. It goes to ensuring the legitimacy and trustworthiness of the legal institutions we prize as lawyers and judges. We need to be more diverse in a more diverse society to have those institutions accepted, respected, valued and trusted – indeed to remain relevant and useful to a majority of the people who live and work here, own homes, run businesses, elect judges and political leaders, serve on juries and otherwise exercise rights as citizens. If the legal profession is not broadly reflective of that multi-cultural society, it cannot help but be viewed as "out of touch" by members of that society. In that case, the value of legal pronouncements, whether from courts or other legal institutions, necessarily will carry less weight.

The benefits we, as a nation, realize when we promote diversity in the educational setting is something Justice Sandra Day O'Connor recognized when writing for the Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003):

> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.
>
> * * *
>
> Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training necessary to succeed in America.
>
> 539 U.S. at 332-333.

The need for diverse legal professionals to become meaningfully present in the legal profession—and especially as judges, top prosecutors and leaders in private practice—finds support in the long recognized need for a diverse officer corps to lead the American military. As detailed in the consolidated *amicus* brief filed on behalf of certain former senior military officers in *Grutter*[11] (cited at length in the *Grutter* opinion),[12] in 2003 more than

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11. Consolidated Brief of Lt. General Julius W. Becton, Jr. et al., No. 02-241, 02-516, February 19, 2003 (Virginia A Seitz, Sidley & Austin, Counsel of Record) ("Becton *Amicus* Brief").

12. *Grutter*, 539 U.S. at 331 (citing to pages 5 and 29 of Becton *Amicus* Brief).

31% of service men and women were African American or Hispanic/Latino (and another 5% Asian American or Native American) (Becton *Amicus* Br. at 4)—reflecting current general population demographics. The *amicus* brief explained that an effective military requires a diverse officer corps to lead diverse soldiers. *Id.* at 7.[13] By increasing racial and ethnic diversity among the officer corps, the military was able to reduce racial polarization, perceptions of discrimination and disciplinary problems. *Id.* at 5-7. The Becton *Amicus* Brief directly identified the need for race-conscious admissions policies at the service academies and other colleges to turn out in numbers talented and qualified officers "of color." *Id.* at 5, 7 ("The military must be permitted to train and educate a diverse officer corps to further our compelling interest in an effective military. . . to expand the pool of highly-qualified minority candidates in a variety of explicitly race-conscious ways.").

In a similar vein, increasing the diversity of lawyers and judges will help legal institutions to be more responsive to minority concerns and to be viewed more favorably by diverse communities, and thereby reduce the significant alienation from the legal system felt by many people of color. Judicial pronouncements will be met with greater acceptance and less suspicion, and the resolution of legal disputes, both civil and criminal, will be aided. *See Grutter*, 506 U.S. at 332-333; Becton *Amicus* Br. at 9 (noting that "[b]road access to the education that leads to leadership roles is essential to public confidence in the

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13. As of February 2003 the officers corps was 81% white (with 8.8% African-American, 4% Hispanic, 3.2% Asian-American and .6% Native American). Becton *Amicus* Br. at 7.

fairness and integrity of public institutions, and their ability to perform their vital functions and missions.").[14]

The legal profession must be permitted to train and educate diverse law students to further the mission of the legal system as well as to produce diversity among the

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14. The ABA 2010 Report identified four rationales for creating greater diversity in the legal profession:

- Democratic Rationale: Lawyers and judges have a unique responsibility for sustaining a political system with broad participation by all of its citizens. A diverse bar and bench create greater trust in mechanisms of government and the rule of law.
- The Leadership Rationale: Individuals with law degrees often possess the communication and interpersonal skills and the social networks to rise into civil leadership positions both in and out of politics. Justice Sandra Day O'Connor recognized this when she noted in *Grutter v Bollinger* that law schools serve as the training ground for such leadership and therefore access to the profession must be inclusive.
- The Demographic Rationale: With respect to the nation's racial/ethnic populations, the Census Bureau projects that by 2042 the United States will be a 'majority minority' country.
- The Business Rationale: Business entities are rapidly responding to the needs of global customers, suppliers and competitors by creating workforces from many backgrounds, perspectives, skill sets and tastes. Ever more frequently, clients expect and sometimes demand lawyers who are culturally and linguistically proficient.

ABA 2010 Report at 5, 9-10.

many political and business leaders who hold JD degrees.[15] Broad access to undergraduate education is essential to ensure that an adequate pipeline of qualified and talented diverse applicants exists for law school.

Regrettably, minority enrollment in U.S. law schools is not meeting the country's need for a diverse legal workforce, even with the benefit of race conscious admissions policies and a precipitous decline in enrollment among white students. A recent study shows that between 2010 and 2013, while overall first-year law school enrollment declined by almost 25% (from 52,488 to 39,675), the decline in minority enrollment was much smaller, averaging just 9.6% across the 196 ABA–accredited schools surveyed. *See* Aaron N. Taylor, *Diversity as a Law School Survival Strategy* (February 2015). Saint Louis U. Legal Studies Research Paper No. 2015-1, at SSRN: http://ssrn.com/abstract=2569847 (last visited Oct. 22, 2015) or http://dx.doi.org/10.2139/ssrn.2569847 at 5, 15 (Table 6). As a result of these dramatic differences in enrollment figures, African American and Hispanic/Latino students (together with Asian American students and other minorities) made up nearly 30% of the first year class entering law school in 2013. *Id.* at 15 (Table 6).[16] This noticeable uptick in proportional enrollment of

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15. In the 114th Congress, 159 Members of the House and a majority of Senators hold law degrees. *See* Membership of the 114th Congress: A Profile, CRS 7-5700 (September 17, 2015) at https://www.fas.org/sgp/crs/misc/R43869.pdf (last visited Oct. 22, 2015).

16. Minority enrollment in 2010 was 25.5%. *Id.* The enrollment experience since 2010 reveals differences among students of color by group. Enrollment of Asian American students dropped from 7.4% in 2010 to 6.7% in 2013. *Id.* at 22 (Table 12). In contrast, Hispanic/Latino enrollment rose from 7.7% in 2010 to 10% in 2013.

minorities is somewhat misleading in at least two respects. First, the recent gains in law school enrollment by African American and Hispanic/Latino students are the direct result of fewer white students (with higher average LSAT scores) applying. If the legal industry were to rebound and offer better employment prospects, these gains by students of color likely would be erased as higher scoring students return to the applicant pool. Second, the growth in African American and Hispanic/Latino enrollment has occurred at less prestigious, lower tier law schools that report lower average LSAT scores. This tends to increase the racial and ethnic stratification within legal education. *Id.* at 30, 5; *id.* at 30-31("Put simply, black and Hispanic students have increased their proportions among law schools considered least prestigious while essentially being shut out of the schools considered most prestigious"). Professor Aaron Taylor, the author of *Diversity as a Law School Survival Strategy* calls these trends "concerning because this country's leaders are disproportionately selected from these schools — a trend symptomatic of our obsession with advantaging the advantaged."[17] He further notes:

> embedded in all of this is a frustrating irony where the schools that are arguably best positioned to lead diversity efforts are doing the least to foster it. As critics of my viewpoint are sure to point out, these schools boast the best

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Id. at 20 (Table 10). African American student enrollment rose from 7.5% in 2010 to 9.1% in 2013. *Id.* at 18 (Table 8).

17. Aaron Taylor, *Questioning the status quo on law school diversity*, National Jurist (May 12, 2015), at http://www.nationaljurist.com/content/questioning-status-quo-law-school-diversity (last visited Oct. 22, 2015).

> student outcomes and have immense resources. But to what good are these advantages serving, other than a favorable US News ranking?[18]

What the current law school enrollment picture demonstrates is the need for strong diversity pipeline initiatives to attract highly capable minority students, with race-conscious admissions policies facilitating the way at every school where diversity lags. The legal profession has a great deal of catching up to do to bring proportionality to its ranks. At the current rate, it will not achieve that goal for at least another generation, if at all. At some point, the legal system's relevance will be lost on many Americans who do not view the system as fair and representative.

2. The National Focus On The Diversity "Pipeline."

The American Bar Association is supporting pipeline initiatives directed at all levels of education (undergraduate, high school, elementary, and kindergarten) in a broad and deep effort to attract traditionally underrepresented students to the legal profession. The ABA's Presidential Advisory Council on Diversity in the Profession in 2006 prepared a report and recommendation that endorsed the following pipeline resolutions:

> FURTHER RESOLVED, That the American Bar Association urges all state, territorial and local bar associations to collaborate with colleges and universities to develop and support pre-law programs that will increase minority applications to law schools and will increase the readiness of minority applicants for law school.

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18. *Id.*

> FURTHER RESOLVED, That the American Bar Association urges all states, territorial and local bar associations to collaborate with elementary and secondary schools to develop and support programs that will increase minority applications and will increase the readiness of minority applicants for college.

ABA House of Delegates Recommendation, adopted August 7-8, 2006, and Report ("ABA 2006 Report"), at http://blogs.law.columbia.edu/salt/files/2009/08/American-Bar-Association.pdf (last visited Oct. 22, 2015).

These and related diversity pipeline resolutions were adopted by the ABA House of Delegates based on the Pipeline Diversity Conference sponsored by the ABA and the Law School Admissions Council. ABA 2006 Report at 2. More than seventy bar groups and associations – including the NYSBA – signed on as official cosponsors of the ABA Pipeline Diversity Resolution.[19]

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19. The co-sponsors (listed at http://www.americanbar.org/groups/diversity/pages/Co_Sponsors.html (last visited Oct. 22, 2015)) are: Advisory Council on Diversity in the Profession; Kansas Bar Association; American Immigration Lawyers Association; National Association of Women Judges; National Bar Association; Bar Association of Erie County; Association of the Bar of the City of New York; **New York State Bar Association**; The Florida Bar; New Jersey State Bar Association; Section of International Law; San Diego County Bar Association; National Lesbian and Gay Law Association; State Bar of New Mexico; King County Bar Association; Maryland State Bar Association; Bar Association of Baltimore City; Section of Taxation; Bar Association of San Francisco; Section of Administrative Law and Regulatory Practice; New York County Lawyers Association; Section of Business Law; Senior Lawyers Division; Section of Dispute

The ABA 2010 Report noted an apparent "consensus on the need for the legal profession to help dramatically improve the P-20 (pre-school through advanced degree) pipeline . . . students, lawyers, judges and clients are increasingly involved in pipeline activities, which emphasize law and civic engagement, aim to keep diverse students in school, facilitate the involvement of students' families, and help all students improve their academic performance to pursue higher education." *Id.* at 12. The ABA 2010 Report further observed that:

Resolution; Oregon State Bar; Judicial Division; Tennessee Bar Association; Illinois State Bar Association; State Bar of Wisconsin; Los Angeles County Bar Association; Hennepin County Bar Association; Ohio State Bar Association; South Carolina Bar; Dade County Bar Association; Health Law Section; DuPage County Bar Association; Section of Litigation; Section of Intellectual Property Law; Santa Clara County Bar Association; Section of State and Local Government Law; Bar Association of the District of Columbia; Law Student Division; Tort Trial and Insurance Practice Section; Washington State Bar Association; Utah State Bar; Austin Bar Association; Arkansas Bar Association; Kentucky Bar Association; Maricopa County Bar Association; Nashville Bar Association; Louisville Bar Association; Monroe County Bar Association; Pennsylvania State Bar Association; Minnesota State Bar Association; National Association of Women Lawyers; Section of Antitrust Law; Energy Bar Association; Hispanic National Bar Association; State Bar of South Dakota; Commission on Immigration; Massachusetts Bar Association; Section of Real Property Probate and Trust Law; Columbus Bar Association; Council on Legal Education Opportunity Commission on Women in the Profession; Council on Racial and Ethnic Justice; Association of American Law Schools; Commission on Racial and Ethnic Diversity in the Profession; Chicago Council of Lawyers; Section of Labor and Employment Law; Section of Individual Rights and Responsibilities; Young Lawyers Division; San Fernando Valley Bar Association; and National Asian Pacific American Bar Association.

> State bars and bar associations are beginning to ***realize the need for a paradigm shift along the educational pipeline***. Diversity programs that 'take the long view,' such as law-oriented pipeline programs focused on high school, college and even middle school are following other professions with robust pipeline programs such as math and science curricula developed by engineering schools.

Id. at 14. *See id.* at 23 (identifying "pipeline" best practices).

3. The NYSBA's Commitment To Increasing Diversity In The Profession.

The NYSBA has long recognized the need to increase diversity in the legal profession and has taken practical and creative steps to address this critical shortcoming but, like many other bar groups, is not able to report significant increases in the number of diverse lawyers entering the profession. That remains a core concern and focus of NYSBA's diversity programming.

The NYSBA formed its first committee on minorities in the profession in 1984, examining concerns about the lack of diversity in the legal profession, especially the absence of traditionally underrepresented groups. That committee—and its successor, the Committee on Diversity and Inclusion—has for more than two decades designed and implemented diversity programs for the NYSBA to benefit its members and the profession. These programs include career development programs in the private sector (*e.g.*, a Minority Hiring and Counsel project to facilitate referral of legal work from corporations to minority

attorneys and firms) and efforts to make the judiciary more diverse. As the result of efforts by the NYSBA and other groups, the state court bench, especially downstate, has become substantially more diverse.[20]

In 1993, the State Bar selected its first African American president, Archibald Murray, who was born in Barbados. Kenneth G. Standard became the second State Bar President "of color" serving from 2004-2005. President Standard was concerned about the low numbers of African American law students (especially male) and commissioned a Special Committee on Youth Outreach to identify the causes of, and possible responses to, the "leakage" in the educational pipeline. *A Major Concern: The Shortage of Minority Lawyers – NYSBA President Heads Committee to Seek Solutions* (The Metropolitan Corporate Counsel, Inc. Vol. 13 No. 3) (March 2005), at http://www.ebglaw.com/content/uploads/2014/06/7342_article_1329.pdf (last visited Oct. 22, 2015). As a result, the NYSBA developed a new program designed to introduce high school students to law school, including by attending a mock law school class.[21]

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20. NYSBA Judicial Report at 54 (noting 19.3% minority representation among judges state-wide); *id.* at 4 (noting, for example, that 93% of all minority Supreme Court Justices were elected in New York City).

21. A description of the NYSBA high school pipeline program (Youth Law Day Program), together with sample agendas, planning timeline and course materials is available on the NYSBA website. *See* Youth Law Day, New York State Bar Association's Special Committee on Youth Outreach, at http://www.nysba.org/CustomTemplates/Content.aspx?id=27946 (last visited Oct. 22, 2015).

Also during President Standard's tenure, reforms were made to the NYSBA's governance structure to open up leadership opportunities for attorneys of color. The Association's by-laws were amended to increase by two seats the size of its executive committee, going from 24 to 26 members, with those two additional seats dedicated for diverse attorneys. At the same time, the NYSBA also added 12 minority seats to the Association's House of Delegates, expanding the number of seats from 283 to 295. In recognition of these efforts, the NYSBA was awarded the ABA's Partnership Award in 2005. *See* http://www.americanbar.org/content/dam/aba/migrated/barserv/partnership/2005/partner10.authcheckdam.pdf (last visited Oct. 22, 2015).

For his work in promoting diversity in the profession, former President Standard received the ABA's Life Achievement Award for Excellence in Pipeline Diversity in 2011.

In 2012, Seymour W. James, Jr. became the third African American to serve as President of the NYSBA. President James, like his predecessors, had a deep commitment to diversity:

> At the State Bar, we know how much we benefit from having diverse perspectives inform our work, and we continue to make our association more inclusive. A long-standing priority of the State Bar has been to ensure that our association reflects the diversity of our profession and our society. We have been making steady progress in that area and through the President's Section Diversity

> Challenge, our immediate past president Vince Doyle has done an outstanding job continuing this tradition. I look forward to building upon his work and that of past presidents.

Making a Difference, NYSBA Journal (June 2012) at 5.

In keeping with the State Bar's long-standing commitment to diversity, and the ABA's efforts on the national stage, the NYSBA commissioned a report that comprehensively examined the state of diversity in the legal profession in New York in 2007 (see *Miles to Go in New York: Measuring Racial and Ethnic Diversity Among New York Lawyers* (NYSBA Committee on Minorities in the Profession) (September 2007) at 4, at http://www.nysba.org/AM/Template.cfm?Section=Committee_on_Minorities_in_the_Profession_Home&Template=/CM/ContentDisplay.cfm&ContentID=12709 (last visited Oct. 22, 2015)) and charted in a 2008 report the next steps for the State Bar to pursue.[22] The Executive Committee of the NYSBA adopted a resolution endorsing the 2008 report and its recommendations to bring greater diversity to the profession.

The NYSBA's Commercial and Federal Litigation ("ComFed") Section established in 2006 a significant new diversity initiative designed to attract attorneys of color to NYSBA and the ComFed Section: the Smooth Moves

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22. NYSBA Special Committee on Civil Rights, *Steps Towards a More Inclusive New York and America* (October 2008), at http://www.nysba.org/WorkArea/DownloadAsset.aspx?id (last visited Oct. 22, 2015).

CLE Program and Awards Ceremony. The event offers complimentary CLE programming relevant to career development such as practice development techniques and public sector career opportunities. It also recognizes an esteemed attorney or jurist of color through the presentation of the Section's Honorable George Bundy Smith "Pioneer Award." The Pioneer Award is given each year to an attorney of color whose career accomplishments exemplify those of the retired New York Court of Appeals judge for whom the award is named: legal excellence, community involvement, and mentoring.[23] Judge Smith was a pioneer in the civil rights movement and devoted 30 years of public service in the New York judiciary, including 14 years as an associate judge of the Court of Appeals. In its nine years, the Smooth Moves program has drawn together more than two thousand lawyers and judges of color for networking, learning, celebration and career development, and attracted hundreds of new diverse members to the NYSBA.

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23. Recipients of the Pioneer Award include Hon. George Bundy Smith himself (who received the inaugural award in 2007); Cesar Perales, the Co-Founder and past President and General Counsel of Latino Justice, who is currently serving in the Cuomo Administration as the Secretary of State for the State of New York; Elaine R. Jones, Director-Counsel Emeritus of the NAACP Legal Defense and Educational Fund; the father-son named partners of the esteemed Manhattan law firm of Kee & Lau-Kee (Glenn Lau-Kee is a former NYSBA president); the Honorable Carmen Beauchamp Ciparick, Associate Judge of the New York Court of Appeals; and the Honorable Samuel L. Green, retired Senior Associate Justice of the New York State Supreme Court Appellate Division, Fourth Department.

Former NYSBA President Vincent E. Doyle III launched the Section Diversity Challenge in which he personally challenged each of the Association's 25 sections to take concrete steps in 2011-2012 to increase diversity in the association and the profession as a whole. The outpouring of ideas from the sections, supported by concrete action plans with both short and long-term goals, earned accolades from the NYSBA leadership—and, in turn, national recognition by the ABA. On August 3, 2012, the ABA presented the ABA's Partnership Award to the NYSBA for its "substantial and innovative efforts to advance diversity" within the association and broader legal community. See ABA Press Release, New York State Bar Association and Baton Rouge Bar Foundation Honored with 2012 ABA Partnership Award (August 1, 2012).

Through these various diversity initiatives, the membership of the State Bar has become more diverse, with attorneys of color increasing from around 8 percent in 2003 to nearly 11 percent in 2013. NYSBA Report Card. The NYSBA's Immediate Past President, Glenn Lau-Kee, was the State Bar's first Asian-American president and is a long-time proponent of diversity initiatives within the State Bar. President Lau-Kee co-chaired the Diversity Challenge for former presidents and encouraged diverse members to participate in the various Association sections. During President Lau-Kee's term, the NYSBA published the NYSBA Judicial Report.

4. The NYSBA's State-wide Diversity Pipeline Initiative.

One of the diversity initiatives that came out of the NYSBA's Section Diversity Challenge is a developing state-wide pipeline program that reaches out to undergraduate students of color. The concept, developed and spearheaded by the NYSBA's ComFed Section, is to have each law school in New York State reach out to nearby colleges and recruit minority undergraduates to participate in an abbreviated moot court competition at the law school. The competition involves reading a handful of cases, meeting with an attorney advisor, and participating in a half-day consisting of two or three rounds of oral argument. The model is designed to spark interest in law school by exposing undergraduate students to law students, lawyers, judges, and law school admissions staff in a fun and supportive atmosphere with the chance to win cash prizes—and without requiring participants to make a burdensome time commitment (there is no writing component). The inaugural competition was held at the State University of New York at Buffalo Law School in April 2012, and drew contestants from the undergraduate program at the State University of New York at Buffalo and one other area school. The program was well received by the participating college students, attorney advisors, judges and administrators. The program is established in Buffalo and Albany Law School is poised to start the program in Spring 2016. Other schools are expected to follow.

Responsibility for these undergraduate moot court programs is designed to be shared among the minority law student organizations at each law school. The NYSBA

program aims to be multi-cultural and attract students of color across the spectrum. Through this and other pipeline efforts, the NYSBA strives to attract more diverse students to law school, a goal that remains critical to the future of the profession.

The NYSBA ComFed Section has long funded a Minority Fellowship program that provides a paid internship for a law student of color to work in the chambers of a New York State Supreme Court Justice assigned to the Commercial Division. More recently, the ComFed Section has partnered with the New York Bar Foundation to fund a Section Diversity Fellowship. These efforts seek to increase the representation of diverse lawyers who practice in the specific field of commercial litigation.

CONCLUSION

The government has a compelling interest in promoting diversity in the legal profession at all levels. That can be achieved only if colleges and universities graduate students of color in substantial numbers to fill law school seats. Accordingly, the holding in *Grutter* that racial diversity in law school is a compelling state interest should be re-affirmed in the context of the undergraduate program at issue here, and that aspect of the court of appeals' decision affirmed.

Respectfully submitted,

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